TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~192~~ 191

ANDRUS WIGGINS, WILLIAM STONEBRAKER, ROBERT NEWSOME, FRANKLIN NEWSOME, AND BENABLE BECK, PLAINTIFFS IN ERROR,

vs.

WILLIAM D. BURKAM.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED JANUARY 2, 1890.

SUPREME COURT OF THE UNITED STATES.

No. 409.

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1 Pleas of the circuit court of the United States for the 7th judicial circuit and district of Indiana, held at the court-house in Indianapolis, on the 5 day of November, A. D. 1867, before Hon'ble David McDonald, judge of the district court of the United States in and for said district.

No. 908.

WILLIAM D. BURKAM
v.
ANDRUS WIGGINS, WILLIAM STONEBRAKER, Robert Newsome, Franklin Newsome, & Benable Beck. } Assumpsit.

Be it rem'bered that on the 22d day of July, A. D. 1866, said plaintiff, by his attorneys, Mess. McDonald, Roach and Sheeks, and George A. Johnson, esqr., filed in the office of the clerk of said court a pricipi in the above-entitled cause in the words and figurs following, to wit:

WILLIAM D. BURKHAM
vs.
ANDREW S. WIGGINS, WILLIAM STONEBRAKERT, Frank Newcomb, & Robert Newcomb. } Assumpsit.—Damage, $6,000 00.

The court of the circuit court will please issue a summons in
2 the above-entitled cause, returnable, according to law, in assumpsit. Damages, $6,000 00.

McDONALD, ROACH & SHEEKS, AND
GEORGE A. JOHNSON,
Att'ys for Plaintiff.

And afterwards, to wit, on the 12th day of December, A. D. 1866, the plaintiff, by his said attorneys, filed in the office of the clerk of said court his declaration in said cause in the words and figures following, to wit:

The plaintiff, William D. Burkham, a citizen of the State of Ohio, complains of the defendants, Andrew S. Wiggins, William Stonebrakert, Frank Newcomb, and Robert Newcomb, and Benable Beck, citizens of the State of Indiana, of a plea of trespass on the case upon premesis.

For that, whereas heartofore, to wit, on the 1st day of March, A. D. 1866, at the district aforesaid, the said defendants were indebted to the said plaintiff in a large sum of money, to wit, in the sum of six thousand dollars, for work and labor, care, diligence, and skill, and com-
3 petency, before that time done and performed and incurred in and about the business of the said defendant, as their factor and agent, and at the special instance and request; and also for goods sold and delivered to the said defendants by the said plaintiff, at their instance and request; and also for mony before that time paid, laid out, and expended by the said plaintiff for the use of the said defendant, and at the instance and request; and also for money loaned to said defendants before that time, by the said plaintiff, at the special instance and request of the said defendant; and being so indebted, the said defendant afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, accounted with the said plaintiff for said several debts, dues, and liabilities, and then in area and unpaid, and upon the

said accumulating the said plaintiffs were found to be in arears and indebted to the said plaintiff in the said sum of six thousand dollars; and being so found in arears and indebted, the said defendant
4 undertook, and then and there faithfully promised, to pay the said sum of $6,000, when they should be thereunto requested; yet the said defendants, although often therunto requested, hath not paid the same or any part thereof.

And for that, wheras the said defendant heretofore, to wit, on the 1st day of May, 1866, at the district aforesaid, were indebted to the said plaintiff in the sum of $6,000 for work and labor, care and skill, before that, in and about the business of said defendant, bestowed by the said plaintiff at the special instance and request of the said defendant; and also the further sum of $6,000 for diligence, journer, and attendance of the said plaintiff, by him before that time done and performed, and bestowed as agent and factor of said defendants, and on his return, for certain commissions and rewards due and if right payable from the said defendants to the said plaintiff in respect thereof; and also for the further sum of $6,000 for goods, wares ,and merchandise, before that
5 time sold and delivered to the said [to the said] defendants by the plaintiff, at their special instruction and request; and also the further sum of $6,000 00 for money paid, laid out, and expended by the said plaintiff for the use and benefit of the said defendants, and at their special instance and request; and also the further of $6,000 00 for money before that time loaned to the said defendants by the said plaintiff, at their special instance and request; and being so indebted, the said defendants afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, then and there undertook and faithfully promised to pay the said plaintiff the said sums of money above specified whenever they should thereunto be required, yet the said defendants, not regarding their several promises and [and] undertakings, have not paid the said sums of money or any part thereof, although thereunto requested, but to pay the sums or any part thereof the said defendants have hitherto wholly failed and refused, and still do refuse, to the damage of said plaintiff six thousand dollars; and therefore he suis.

McDONALD, ROACH AND SHEEKS,
Att'ys for Plaintiff.

6 And afterwards, to wit, at the November term of said court, to wit, on the 2d day of January, A. D. 1867, before the Honorable David McDonald, judge of the district court of the United States for the district of Indiana, the following further proceedings were had in the said cause:

Ordered by the court that this cause be continued.

And afterwards, to wit, at the May term of said court, to wit, on the eighth day of May, A. D. 1867, before the Honorable Samuel H. Treat, judge of the United States district court for the southern district of Illinois, specially appointed to hold said court, the following further proceedings were had in said cause:

Now comes the plaintiff, by Mess. McDonald, Roach and Sheeks, his attorneys, and upon their motion the defendants were ruled to plead on or before the fifth day of this term.

And afterwards, to wit, at the May term of said court, to wit, on the 11th day of May, A. D. 1867, before the Honorable Samuel H. Treat,

7 judge as aforesaid, the following further proceedings were had in said cause:

Come now the defendants by S. E. Perkins, esq'r, their attorney, and file their plea in abatement of the action herein as follows, to wit:

And afterwards, to wit, at the May term of said court, to wit, on the 13th day of May, A. D. 1867, before the Honorable Samuel H. Treat, judge as aforesaid, the following further proceedings were had in said cause:

Come now the parties by their respective attorneys, and upon their argument it is ordered, that the name Andrew J. Wiggins be struck from the record, and that the name Andrew Wiggins be inserted instead thereof; and it is ordered, upon the further agreement of the parties, that Benable Beck be made a defendant, his attorney now enters his appearance to the action, and the same is continued until the next term of the court.

8 And afterwards, at the November term of said court, to wit, on the 14th day of November, A. D. 1867, before the Honorable David McDonald, judge of the district court of the United States for the district of Indiana, the following further proceedings were had in said cause:

And afterwards, at the May term, A. D. 1867, of the court aforesaid, said cause was continued under the general order for continuance.

Come now the parties by councel, and the defendant now files the plea of the general issue and an argument, in the words following:

Come now the defendant and defend the wrong and injury, where, &c., and say that he did not promise and agree in manner and form as stated in the plaintiff's declaration; and of this they put themselves upon the country.

JOHNSON, HENDRICKS ET AL.,
For Def'ts.

9 It is agreed that the defendants may give evidence and receive the benefit of any proper defence, set-off, and counter-claim under the above plea of the general issue, which they might under any special please, defences, set-off, and counter-claims specially stated and pleaded.

Nov. 20, 1867.

JOHNSON, HENDRICKS ET AL.,
For Def'ts.
McDONALD AND JOHNSON,
Att'ys for Pl'ffs.

And this cause coming on to be tried, here comes a jury, to wit: Charles Oswald, Reddick Wiley, Winston P. Noble, Stephen Spencer, Clark Willis, O. H. P. Lindsey, Ezia Harding, Edward S. Gardner, John L. Shirley, Lewis F. Bougher, William H. Smith, and A. W. Jenkins, who, being empanelled and sworn, and having heard a part of the evidence, are by the court permitted to separate until nine o'clock to-morrow morning.

And afterwards, to wit, at the November term of said court, to wit, on the 21st day of November, A. D. 1867, before the Honorable David McDonald, judge as aforesaid, the following further proceedings were had in said cause:

10 Come now the parties by their attorneys, and the jury come also, and having further heard the evidence herein, are by the court permitted to separate until to-morrow morning at nine o'clock.

And afterwards, at the November term of said court, to wit, on the 22d day of November, A. D. 1867, before the Honorable David McDonald, judge as aforesaid, the following further proceedings were had in the said cause:

Come now the parties by their attorneys, and the jury herein also come, and haveing heard the residue of the evidence are by the court permitted to separate until to-morrow morning.

And afterwards, at the November term of said court, to wit, on the 23d day of November, A. D. 1867, before the Honorable David McDonald, judge as aforsaid, the following further proceedings were had in the said cause:

11 Now come the parties by their respective attorneys, and the jury do now say and find, We the jury find for the plaintiff, and assess his damages at the sum of forty-six hundred dollars. And the defendants now move the court for a new trial herein, in the words and figures following:

Comes now the defendants, and move the court for a new trial in the cause for the following reasons, to wit:

1st. The verdict is contrary to the law and evidence.
2d. The verdict is not sustained by sufficient evidence.
3d. The court erred in the instructions to the jury.
4th. The instructions of the court might have misled the jury.
5th. The evidence did not authorize a recovery for the plaintiff.

JOHNSON, FOX, PERKINS & HENDRICKS,
For Def'ts.

And afterwards, to wit, at the November term of said court, to wit, on the 7th day of January, A. D. 1867, before the Honorable David McDonald, judge as aforesaid, the following further proceedings

12 were had in the said cause:

Come now the parties by their respective attorneys, and the court being now advised doth overrule the motion of said defendants for a new trial herein.

It is, therefore, considered by the court that the plaintiff do recover of the defendant said sum of four thousand and six hundred dollars, so as aforesaid assessed and found, together with the costs and charges herein, taxed at $.

And afterwards, to wit, at the November term of said court, to wit, on the 15th day of January, A. D. 1867, before the Honorable David McDonald, judge as aforesaid, the following further proceedings were had in the said cause:

Come now the parties, and the defendants file their bill of exceptions herein in the words and figures following:

13 Be it remembered that on the trial of this cause it was proved that, at the time of the transactions in litigation between the parties, and thence till the commencement of this suit, the plaintiff resided at the city of Chicago, Illinois, and the defendants at the town of Hagerstown, in Wayne County, Indiana, distant from each other about two hundred and twenty miles by railroad.

And be it further remembered that on said trial there was evidence

tending to prove that the plaintiff, on or about the 16th day of May, 1866, sent to the defendant by mail a written statement of the account sued on in this case, in the nature of an account-current; and that the defendants made no objection to the same till on or about the 28th day of the same month, when they addressed to the plaintiff a letter by mail objecting to some of the items of said account-current, and making no objections to some other items thereof, to which latter items they never, till the commencement of this suit, appeared to have objected.

And be it also remembered that thereupon, and before the jury
14 retires to consider of their verdict, the plaintiff prayed the court to instruct the jury as follows, to wit:

That when an account is rendered by a creditor to his debtor, if the debtor does not within a reasonable time after he has examined the same, make any objection thereto, his silence unexplained is an implied admission of the correctness of such account, though not conclusive evidence thereof, and if the debtor, within such time, objects to some of the items, and, during such reasonable time, makes no objection to the residue of such items he ought, prima facie, to be presumed thereby to admit the correctness of the items not objected to, and in both the foregoing instances the account so, in whole or in part, admitted is to be deemed, in legal effect, an account stated.

To the giving of which instruction the defendants then and there objected; but the court overruled the objection, and gave said
15 instruction to the jury, to which opinion of the court in overruling said objection and in giving said instruction, the defendant then and there excepted.

Whereupon the defendants, by their counsel, then and there prayed the court to instruct the jury as follows, to wit:

That if the plaintiff made out his account on the 16th day of May, 1866, and then sent it to the defendants, it was within a reasonable time if the defendants, on the 28th day of that month, by letter, notified the plaintiff of their dissatisfaction with that account. But the court refused to give the said instructions, and, on the contrary, then and there instructed the jury that what was reasonable time for a debtor to object to his creditor's account after its presentation to him, is a matter of fact for the consideration of the jury, and not a matter of law to be decided by the court, to which last-named instruction the defendant objected.

16 To which opinion of the court in refusing to give the instruction so prayed by the defendants as aforesaid, and in giving the last-named instruction so given as aforesaid, the defendants, by their counsel, then and there excepted.

And the defendants, by their counsel, pray that the judge may sign and seal this, their bill of exception, and make the same a part of the record herein, which is done.

DAVID McDONALD. [SEAL.]

17 In the United States circuit court, district of Indiana.

I, John D. Howland, clerk of said court, do hereby certify the above and foregoing to be a full, true, and complete copy and transcript of the record and proceedings in the above-entitled cause, as the same appear of record in said court.

Witness my hand and the seal of said court this 17th day of January, A. D. 1868.

[SEAL.] J. D. HOWLAND, *Clerk.*

18 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the seventh circuit and district of Indiana, greeting:

Because in the record and proceedings, as also in the rendition of judgment in a plea which is in the said circuit court before you between William D. Burkam, (defendant in error,) and Andrus Wiggins, William Stonebraker, Franklin Newsome, and Robert Newsome, and Benable Beck, (plaintiffs in error,) a manifest error hath happened to the great damage of the said Andrus, William, Franklin, and Robert, and Benable, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf:

You are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the

19 Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the seventh day of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this seventeenth day of January, A. D. 1868, and of the independence of the United States the 92d.

[SEAL.] JOHN D. HOWLAND, *Clerk.*

19 UNITED STATES OF AMERICA, *ss:*

To William D. Burkam, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States for the 7th circuit and district of Indiana, wherein Andrus Wiggins, William Stonebraker, Franklin Newsome, and Robert Newsome, and Benable Beck, are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable David McDonald, judge of the district court of the United States in the circuit and district aforesaid, this 16th day of January, A. D. 1868.

DAVID McDONALD,
Judge of the U. S. Dis. Court District of Indiana.

20 We acknowledge service of this citation.
Jan'y 16, 1868.

McDONALD, ROACHE & SHEEKS,
Atty's for Pl'fs.

IN THE SUPREME COURT

OF THE

UNITED STATES.

ANDRUS WIGGINS,
WILLIAM STONEBREAKER,
ROBERT NEWSOME,
FRANKLIN NEWSOME and
BENABEL BECK

vs.

WILLIAM D. BURKHAM.

No. 409.

BRIEF for the ~~appellants.~~ *plff in err*

The plaintiff declared in the common counts, and the defendants pleaded the general issue. By the bill of exceptions, pp. 4 and 5, it appears that on the trial there was evidence tending to prove that the plaintiff on or about the 16th day of May, 1866, sent to the defendants by mail a written statement of the account sued on in this case, in the nature of an account current; and that the defendants made no objection to the same till on or about the 28th day of the same month, when they addressed to the plaintiff a letter by mail objecting to some of the items of said account current, and making no objection to some other items thereof. And it was proven that at the time of these transactions the plaintiff resided at Chicago, in the State of Illinois, and the defendants at Hagerstown, in the State of

IN THE SUPREME COURT

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UNITED STATES.

ANDRUS WIGGINS,
WILLIAM STONEBREAKER,
ROBERT NEWSOME,
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No. 409.

BRIEF for the ~~*Appellants.*~~ Pl'ffs in Error

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Indiana, distant from each other about two hundred and twenty miles by railroad.

It became material at the trial upon these facts, that the jury should know what was the force and effect of the transmission through the mail, by the plaintiff to the defendants, on the 16th of May, 1866, of an account stated, and holding the same after it was received by the defendants till the 28th of the month—a period of ten or eleven days, when the defendants by mail made their dissent to the account as stated.

Upon the prayer of the plaintiff, and over the objection of the defendants, the Court instructed the jury (p. 5):

"That when an account is rendered by a creditor to his debtor, if the debtor does not, within a reasonable time after he has examined the same, make any objection thereto, his silence unexplained is an implied admission of the correctness of such account, though not conclusive evidence thereof, and if the debtor, within such time, objects to some of the items, and during such reasonable time, makes no objection to the residue of such items, he ought, *prima facie*, to be presumed thereby to admit the correctness of the items not objected to, and in both the foregoing instances the account so, in whole or in part, admitted is to be deemed, in legal effect, an account stated."

The defendants then prayed the Court to instruct the jury as follows:

"That if the plaintiff made out his account on the 16th day of May, 1866, and then sent it to the defendants, it was within a reasonable time if the defendants on the 28th day of that month, by letter, notified the plaintiff of their dissatisfaction with that account." But the Court refused to give the said instructions, and, on the contrary, then and there instructed the jury that "what was reasonable time for the debtor to object to his creditor's account after its presentation to him, is a matter of fact for the consideration of the jury, and not a matter of law to be decided by the Court."

The defendants objected to this last instruction, and excepted to the same, and to the action of the Court in refusing the instruction as asked.

The only question presented in this case arises upon the foregoing instructions and refusal.

The rule stated in the instruction is that which applies to a settlement of disputed accounts by the parties—where, upon conference, they agree to the result. In that case the settled account is *prima facie* correct, and may be impeached by evidence of fraud, omission or mistake.

(Perkins *vs.* Hart, executor of Hart, 11 Wheaton, R., 287; Hager *vs.* Thomson, *et al.*, 1 Black., 80.)

It is submitted, that the facts in this case did not authorize so strong a statement of the rule, and the jury were probably misled. The instruction goes far beyond the position of this court, in Freeland *vs.* Heron *et al.*, 7 Cranch, 147. As the instructions were given upon the facts in the case, the jury supposed that a failure to question the account for ten days was an admission of its correctness. In Case *vs.* Hotchkiss, 3 Keyes (N. Y.) R., 334, the Court held that to receive and hold an account for more than one year, without objection, was an admission of its correctness. In Lockwood & Ladew *vs.* Thorne *et al.*, 12 Barb., 487, the defendants forwarded by mail to plaintiffs an account current, making the balance due the plaintiffs $5,623.41. This account was forwarded from New York city to the parties who resided in Ulster county. No objection having been made to the account current, on the 17th of that month the plaintiffs drew for the amount so stated to be due. The Court held that it could not be presumed that the plaintiffs acquiesced in the correctness of the account merely because no objection was made. This case was reviewed in the Court of Appeals, 1 Kernan, 170, and the judgment below reversed (the Court being divided); but the Court held that the drawing for the balance stated was an express agreement to the account; and that the holding the account for nine months without objection until suit was brought, was an acquiescence.

In Dows *vs.* Durfee *et al.*, 10 Barb., 213, it is said: "The principle of the decisions is that if the account has been kept so long that it must be inferred that the party receiving it has had time to examine it and object to it if it was wrong, he must be presumed to have acquiesced in it if he remained silent." The account had been retained in that case about two months without objection, when the suit was commenced.

The defendants were justified in asking the Court to instruct the jury upon the hypothesis they stated, for the record shows there was evidence in its support. Did the Court err in refusing

the instruction, and also in saying to the jury, "that what was reasonable time for a debtor to object to his creditor's account after its presentation to him, is a matter of fact for the consideration of the jury, and not a matter of law to be decided by the Court"?

In Lockwood *vs.* Thorne, 1 Kernan, on page 173, the Court says: "The second point made by the defendants is that the referees erred in not giving legal effect to an account stated and settled between the parties, and in permitting the same to be opened without proof of fraud or mistake: and this presents properly a question of law for our decision; for whether on a given state of facts the transaction amounts to an account stated is a question of law and not of fact."

(Toland *vs.* Sprague, 12 Peters, R. 300.)

In Gatling *vs.* Newell, 9 Ind., 572, on page 577, the Court says: "It is well settled that a party who would rescind a contract on the ground of fraud, must offer to do so in a reasonable time after the fraud is discovered. * * But who is to determine the question of reasonable time? Is it one of law or fact? Where there are no facts involved but the simple one of the length of time elapsed, it is a question of law."

(Atwood *vs.* Clark, 2 Green, 249; Kingsley *vs.* Wallace, 14 Maine, 59; Murry *vs.* Smith, 1 Hawkes, 41; Roth *vs* Buffalo & State Line Railroad Co., 34 N. Y. R., 548.)

In the case last cited upon the question of "reasonable time," the Court says: "Ordinarily it is a mixed question of law and fact; when the testimony is conflicting, and the facts are unsettled, the jury are to decide, under the instructions of the Court, as to the law; when there is no dispute as to the facts, the question is purely one of law, and the Court should decide it."

(Citing 11 Johns, 187; 3 Coms., 272; 3 Seld., 266; 27 Barb., 221; 2 Duer, 259; 1 Wend., 457.)

2 Parsons on Contracts, 535, and note on page 661.

The only remaning question is, ought the Court to have instructed the jury that it was within a reasonable time if the defendants objected to the account rendered in ten or eleven days? The plaintiff resided in Chicago, and the defendants at Hagerstown, Indiana, distant 220 miles; and the account was mailed on the 16th, and the defendants mailed their objections on the 28th May.

Upon the question of reasonable time, or reasonable diligence, it is proper to consider the possible uncertainty of the delivery of the mail at an interior and unimportant town, and that the account was against the five defendants, and that it was the right of each defendant to examine the account, and that it can not be assumed that the defendants acquiesced in the correctness of the account, until sufficient time has elapsed to allow each defendant to examine the same. It would be unreasonable to hold that an account placed in the mail at Chicago on the 16th May, was received at the little town of Hagerstown, in Indiana, 210 miles distant, in time to be examined by the five defendants, so that they could agree or object to the same before the 28th of that month. The cases like this allow a longer time before the party shall be held as concluded by his silence. In Toland *vs.* Sprague, 12 Peters R., 300 (on page 333), the defendant, at Gibralter, on the 30th June, 1825, forwarded his account to plaintiff, showing a balance due plaintiff, and in September the plaintiff wrote him requesting payment of the balance so stated as due. The Court held (page 334) that from the time the plaintiff made such demand of payment, the account became stated and settled, and was no longer open and unsettled. In Freeland *vs.* Heron *et al.*, 7 Cranch, 147, this Court said: "It is proper to observe, that it appears by the record that Heron, Lenox & Company furnished A. Freeland with an account current annually for the first four years of their transactions, and that no objection was made to them.

"This circumstance, combined with the promise contained in A. Freeland's letter of September, 1796, to pay the whole balance due, affords room for the application of a rule of the chancery court and of merchants to decide the controversy. It is this: When one merchant sends an account current to another, residing in a different country, between whom there are mutual dealings, and he keeps it two years without making any objections, it shall be deemed a stated account, and his silence and acquiescence shall bind him, at least so far as to cast the *onus probandi* on him."

In many of the cases decided upon this question, the party sending the account current acted upon the acquiescence implied from the silence of the party to whom it is furnished, by

drawing for the balance due, or by bringing suit. But in the case now before the Court, the plaintiff took no steps to enforce any claim upon the supposed account stated: and it was long after the objections of the defendants were received before this suit was brought. It is certainly a hard rule that the parties shall be held to have admitted the correctness of an account which they disputed as soon as they could, with reasonable diligence examine and consider the same, and especially when it is considered that the action of the plaintiff was in no way influenced by any supposed delay in the answer.

A judgment for a large sum of money has resulted in this case from the instructions of the Court, which this Court is asked to reverse.

THOS. A. HENDRICKS,
Attorney for Plaintiffs in Error.

IN THE SUPREME COURT

OF THE UNITED STATES.

ANDRUS WIGGINS ET AL. *vs.* WILLIAM D. BURKAM.	IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF INDIANA.

BRIEF OF DEFENDANT IN ERROR.

The declaration in this case contains two counts (*in assumpsit*). 1st. The common counts. 2d. Upon an account stated. The general issue was pleaded to the whole declaration. A general verdict was returned for defendant in error, and his damages assessed at $4,600, and judgment was rendered upon the verdict.

The bill of exceptions reserves two questions. *First*, as to the correctness of the following instruction given by the Court:

"That when an account is rendered by a creditor to his "debtor, if the debtor does not, within a reasonable time after "he has examined the same, make any objection thereto, his "silence unexplained is an implied admission of the correctness "of such account, though not conclusive evidence thereof, and "if the debtor, within such time, objects to some of the items, "and, during such reasonable time, makes no objection to the "residue of such items, he ought, *prima facie*, to be presumed "thereby to admit the correctness of the items not objected to,

"and in both the foregoing instances, the account so in whole "or in part admitted is to be deemed, in legal effect, an account "stated."

It is difficult to see on what grounds this instruction is objected to. The evidence as shown in the bill of exceptions tends to support it, and the legal propositions contained in it are in strict accordance with the law, as laid down in 1st Story's Equity, § 526. The text in Story is sustained by numerous authorities, among which we cite—

Lockwood *vs.* Thorn, 1st Kernan, 170.

Willis *vs.* Jernegan, 2d Atk., 251.

Sherman *vs.* Sherman, 2d Vern., 270.

In Lockwood *vs.* Thorn, *supra*, the Court says: "The rule, "as laid down by the authorities, would seem to be that if one "does not object to a stated account which has been furnished "him, within a reasonable time, he shall be bound by it, unless "he can show its incorrectness."

We admit the rule as stated in Toland *vs.* Sprague, 12th Peters, cited by the plaintiffs in error, namely: "that the mere "rendering an account does not make it a stated one;" but this does not conflict with the instructions given, nor with the authorities cited, for it is the subsequent conduct of the party to whom it is rendered that determines the question, and it becomes an account stated only by the admission of its correctness, expressed or *implied*, by such party. The instruction given, and the authorities cited, both are to the effect that unexplained silence is such an implied admission as gives it the character of an account stated.

Second. Was it error for the Court to refuse the following instructions, asked for by the plaintiffs in error:

"That if the plaintiff made out his account on the 16th of "May, 1866, and sent it to the defendants, it was within a "reasonable time if the defendants, on the 28th day of that "month, by letter, notified the plaintiff of their dissatisfaction "with that account."

It will be seen that the instruction asked for was designed to cover the whole question raised, as to an account stated, and to inform the jury that if, within twelve days from the time the account was sent, the plaintiffs in error expressed, by letter, "dissatisfaction" with it, that would, (as a question) of law, be

within a reasonable time. The bill of exceptions does not present a state of facts that could demand this instruction, even if "reasonable time" is a question of law, as claimed by the counsel for the plaintiffs in error. On recurring to the statement of facts, it will be seen that the distance between the residence of the parties was only 220 miles by railroad; that is about ten hours of time, as the Court will take judicial notice, of the usual time of travel upon railroads. It is not stated how frequently the mails passed between these points; but it does appear that twelve days after the account was sent, the plaintiffs in error, by letter, objected to some of the items of the "account current" and made "no objection to some other items thereof;" but what items were thus objected to, and to what items no objection was made, no where appears. Upon such facts as these, it was unquestionably the duty of the Court to deny the instruction, as it pre-supposed a state of facts that did not exist in the case, for we insist that to "object to some items of an account," and to make no objections to others, is not expressing dissatisfaction with the account. On the contrary, it is an implied admission in favor of such items as are not objected to, much stronger, we contend, than the admission arising from mere silence unexplained. To have given it, would have misled the jury and destroyed the effect of the instruction already given. But, in refusing to give it, the Court informed the jury "that "what was reasonable time for a debtor to object to his credit-"or's account, after its presentation to him, is a matter of fact, "for the consideration of the jury, and not a matter of law, to "be decided by the Court." And it is claimed that this statement of the Court is error, or that it, at least, renders erroneous the refusal of the Court to give the instruction asked for. In support of this proposition, it is contended by the plaintiffs in error, that the statement of the Court, as a legal proposition, is radically wrong, and that the question of reasonable time is at all times a question of law, for the decision of the Court. This position is not tenable; for whether it is a question of law or fact, depends upon the circumstances of the case in which it arises.

It is a question of law where no other consideration enters into the question, except the mere lapse of time, or where

there is no dispute about the facts. This is the position as sustained by the authorities cited in the brief of the plaintiff in error, especially in the cases of—

Gatling *vs.* Newell *et al.*, 9th Ind., page 577.

Roth *vs.* Buffalo and State Line R. R. Co., 34 N. Y., 548.

It is a question of fact, or what amounts to the same thing, in the trial of a cause—a mixed question of "law and fact," and therefore for the jury—where there is a conflict in the testimony, or where the facts are not all clear, or where other elements enter into it other than the mere lapse of time, as opportunity, distance, the frequency and character of the intercourse between the parties. In support of this position we rely on the authorities above cited, and also Lockwood *vs.* Thorne *et al.*, 18th N. Y., 285.

This case is a review of the same case reported in 1st. Kernan, and cited by the plaintiffs in error, and draws the proper line of distinction between the duty of the Court and the province of the jury in this class of questions.

What was the state of the question in this case? The Court before whom the case was tried says it was a question of fact for the jury. There is nothing in the statement of facts in bill of exceptions, that brings this question within the rule laid down in the cases above cited (as a question of law). It is not stated that there were no other facts bearing on the question, and it is quite clear that other facts did enter into it, such as the business relations of the parties, the frequency of the mails, and the opportunities to communicate with each other; and in this connection, the nature of the claims sued on will have its bearing, for the account stated, as will be seen by the record, is (in part) upon the indebtedness arising from the relation of Factor and Principal, which, of itself, pre-supposes frequent communications. All of these facts, inasmuch as they are not concluded by the bill of exceptions, and are consistent with the case, and the facts stated in the bill of exceptions, must be presumed in favor of the ruling of the Court.

Again, Justice Story, in the paragraph above cited, says:

"Between merchants at home, an account which has been "presented, and no objection made thereto, after the lapse of "several posts, is treated, under ordinary circumstances, as "being, by acquiescence, a stated account."

Tested by this rule, either it was proper for the Court to refuse the instruction on the ground that the objection to the account came too late, or that, in determining the question, the jury had the right to consider all the facts, and from them say how far the objections made by the plaintiffs in error could avail them. In either view of the case, there is no error for which this judgment ought to be reversed. We trust, therefore, that the judgment in this cause may be affirmed.

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